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ORIGINAL

RESPONSE REQUESTED

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5393

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOSE M. LOZADA, Petitioner,

v.

GEORGE DEEDS, Warden, and
BRIAN McKAY, Attorney General of the State of Nevada,

Respondents

BRIEF OF THE RESPONDENTS IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court grant discretionary review of the dismissal of the Petition for Writ of Habeas Corpus when three circuit courts of appeal and Nevada's highest court have rendered conflicting decisions on the issue of whether a petitioner seeking habeas relief must demonstrate prejudice resulting from counsel's alleged failure to effectively assist in pursuing a direct appeal from conviction?

2. Should the Court grant discretionary review of whether the petitioner was entitled to an evidentiary hearing when the lower courts disposed of the Petition for Writ of Habeas Corpus on legal grounds only?

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OPINIONS AND JUDGMENTS DELIVERED BELOW

This is a Petition for Writ of Certiorari seeking review of an order denying a certificate of probable cause to appeal entered by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) on May 30, 1990. See Exhibit 8 to Petition for Writ of Certiorari. That order denied relief from the summary decision of the United States District Court for the District of Nevada (federal district court) dismissing the petitioner's Petition for Writ of Habeas Corpus. (Appendix A). See Exhibit 7 to Petition for Writ of Certiorari. The federal district court also declined to issue a certificate of probable cause to appeal.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked by the subject certiorari petition pursuant to section 1257(3) of Title 28 of the United States Code. 28 U.S.C. Sec. 1257(3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section One of the Fourteenth Amendment to the United States Constitution.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

2. Fifth Amendment to the United States Constitution.

No person shall be . . . deprived of life, liberty, or property without due process of law.

3. The Sixth Amendment to the United States Constitution.

In criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

4. 28 U.S.C. Sec. 2254:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
>
> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the

State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record is the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court,

duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding. (As amended Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105.)

5. Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts.

(a) Determination by court. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

(b) Function of the magistrate.

(1) When designated to do so in accordance with 28 U.S.C. § 686(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 8006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 8006A at any stage of the case if the interest of justice so requires.

6. Rule 10 of the United States Supreme Court Rules:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

STATEMENT OF THE CASE

Jose Lozada (hereinafter LOZADA) is presently incarcerated in Nevada's Department of Prisons at the Southern Desert Correctional Center. On January 7, 1987, a Clark County, Nevada jury convicted LOZADA of one count each of Conspiracy to Sell Controlled Substance, Sale of Controlled Substance, Trafficking in Controlled Substance, and Possession of Controlled Substance. The court sentenced LOZADA to serve a total of 23 years in the state prison.

LOZADA never took a direct appeal of the conviction. (Appendix D). Instead, on or about January 11, 1988, he filed a Petition for Post-conviction Relief pursuant to Nev. Rev. Stat

177.315 et. seq. (Appendix B) in the Eighth Judicial District Court. The court denied the petition on July 12, 1988. LOZADA appealed the state district court's denial of the petition.

The Nevada Supreme Court dismissed LOZADA's appeal by an unpublished order, dated October 21, 1988. See Order Dismissing Appeal, attached as Exhibit 5 to Petition for Writ of Habeas Corpus. The supreme court noted that LOZADA's sole contention in his post-conviction petition was that his trial counsel was ineffective because he failed to inform LOZADA of his right to appointed counsel on direct appeal and falsely told him that he (the attorney) had referred the case to the county public defender to prosecute the appeal. See Lozada v. State of Nevada, Case No. 19333, Order Dismissing Appeal, pp. 1-2. The state supreme court found that LOZADA neglected to allege any issues which could have been raised on appeal and did not demonstrate that he could succeed. Id., at 2. Relying on Strickland v. Washington, 466 U.S. 668 (1984), the state supreme court concluded that LOZADA did not make the required showing of prejudice to support a claim of ineffective assistance of counsel. Id.

On March 5, 1989, LOZADA filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. sec. 2254 in the federal district court. See Petition, attached hereto as Exhibit A. He alleged that his Sixth Amendment right to effective assistance of counsel was violated when his retained trial counsel failed to advise him of (1) his right to appeal, and (2) the procedures and time limits to appeal. The petition further alleged that LOZADA directed his

sister to meet with his trial counsel to discuss hiring his services. His trial counsel purportedly told LOZADA's sister that he had forwarded his case to the Clark County Public Defender's office since it would be cheaper for LOZADA to have the public agency prosecute the appeal.

By an Order, dated March 13, 1990, the federal district court dismissed the petition without holding an evidentiary hearing. Citing Strickland, supra, and Murray v. Carrier, 477 U.S. 478 (1986). The federal district court ruled that LOZADA was required to show that his attorney's performance was deficient and to show that but for the deficiency, the result would have been different. The federal district court found it unnecessary to decide whether trial counsel's performance was substandard. Instead, the federal district court focused on the second prong of the Strickland test. It found that LOZADA did not identify any issue which he could have successfully raise on appeal. Accordingly, the federal district court dismissed the petition, ruling that LOZADA completely failed to demonstrate any prejudice flowing from the alleged deficiencies of trial counsel. See, Order, Lozada v. Deeds, Case No. CV-S-89-173-LDG(LRL), attached as Exhibit 6 to Petition for Writ of Certiorari. Both the federal district court and the Ninth Circuit declined to issue a certificate of probable cause. See attached Exhibits 7 and 8 to Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Respondents submit that a grant of writ of certiorari is appropriate because a division of authority exists among three

circuits and the Nevada Supreme Court with respect to whether a petitioner must demonstrate prejudice stemming from the alleged failure of counsel to effectively assist in the filing of the first appeal as of right. Additionally, this case involves important issues left open in Muray v. Carrier, 477 U.S. 478 (1986) and Evitts v. Lucey, 469 U.S. 38887 (1985). Discretionary review of the issue regarding the need for an evidentiary hearing is unwarranted at this juncture since the lower court based its decision solely on legal grounds.

ARGUMENT

1. The Court Should Grant Discretionary Review of the Dismissal of the Petition for Writ of Habeas Corpus Because Three Circuit Courts and Nevada's Highest Court have Rendered Conflicting Decisions on the Issue of Whether a Petitioner Seeking Habeas Relief Must Demonstrate Prejudice Resulting from Counsel's Alleged Failure to Perfect a Direct Appeal.

In this case, the Nevada Supreme Court ruled that LOZADA had not demonstrated prejudice as the result of his attorneys' alleged deficient representation. Inferentially, by denying a certificate of probable cause, the Ninth Circuit agreed.

Three federal circuit courts have reached divergent published results in deciding whether a petitioner seeking habeas relief must demonstrate prejudice resulting from counsel's alleged failure to effectively assist in pursuing an appeal from a conviction. The disagreement focuses on the proper application of Strickland v. Washington, 466 U.S. 688 (1984) and its progeny. More precisely,

the circuits disagree on how, if at all, to apply the Strickland requirement that a petitioner must show prejudice by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Arguably, the Ninth Circuit has ruled that petitioners must satisfy the prejudice requirement of Strickland by raising errors which could have been successfully raised on Appeal. United States v. Popoola, 881 F.2d 811, 813 (9th Cir. 1989). The Popoola decision represents a departure from the Ninth Circuit's decisions prior to Strickland. See Doyle v. United States, 721 F.2d 1195 (9th Cir. 1983); Riser v. Craven, 501 F.2d 381 (9th Cir. 1974); Sanders v. Craven, 488 F.2d 478 (9th Cir. 1973). In contrast to Popoola, the United States Court of Appeals for the Tenth Circuit has ruled that the Strickland requirement of showing prejudice is inapplicable when counsel fails to properly perfect an appeal. Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990). The Abels court applied the pre-Strickland holding in Rodriguez v. United States, 395 U.S. 327 (1969). The Eighth Circuit has ruled likewise. Williams v. Lockhart, 849 F.2d 1134, 1137 & n.3 (8th Cir. 1986); Bell v. Lockhart, 795 F.2d 655, 657-58 (8th Cir. 1986). See also, Simmons v. Beyer, 689 F.Supp. 432, 445-46 (D.N.J. 1988) (holding failure to file appeal constitutes per se prejudice).

Respondents submit that resolution of the conflict among the circuits and Nevada Supreme Court will require this Court to reconcile Strickland with Rodriquez. As the Eighth Circuit

indicated, whether Strickland overrules Rodriquez is unclear. Estes, 883 F.2d at 649; Bell, 795 F.2d at 657 n.7.

Additionally, this case presents the opportunity to address issues left open in Murray v. Carrier, 477 U.S. 478 (1986). In Murray, the Court applied the "cause and prejudice" rule of Wainwright v. Sykes, 433 U.S. 72 (1977) to a claim that appellate counsel failed to raise a particular issue on appeal which resulted in procedural default on that issue. Murray, 477 U.S. at 483-97. This Court ruled that the petitioner must show cause and prejudice resulting from the procedural default. Id, at 488. This Court left open the issue of whether the cause and prejudice rule should apply to instances where counsel failed to take an appeal. Id. at 492. The instant case involves a procedural default caused by the alleged failure of counsel to assist LOZADA in prosecuting an appeal within 30 days of entry of conviction. See NRAP 4(b). (Appendix D). The federal district court relied upon Murray in holding that LOZADA failed to demonstrate prejudice. See Lozada v. State of Nevada, Case No. 19333, Order Dismissing Appeal, p. 1-2. Accordingly, this case involves the issue left open in Murray.

The instant case also involves an issue left open in Evitts v. Lucey, 469 U.S. 387 (1985). In Evitts, the petitioner's attorney neglected to file a statement of appeal along with his appellate brief and record, which resulted in a dismissal of the appeal. Id. at 389-90. The Evitts Court confirmed that the right of effective assistance of counsel extends to appellate proceedings, but left open the question of appropriate standards for judging claims of

ineffective assistance of counsel. Id. at 392. Although in Evitts this Court ruled that the states cannot dismiss the first right of appeal when counsel fails to follow mandatory appellate procedures, it did so without analysis of the prejudice requirement in Strickland. See Id. at 392-405. Thus, it remains to be seen whether Evitts is limited to its facts or is to be broadly construed by holding that prejudice is presumed when counsel fails to pursue an appeal.

2. The Court Should Not Accept Discretionary Review of Whether the Petitioner was Entitled to an Evidentiary Hearing Because the Lower Court Disposed of the Petition for Writ of Habeas Corpus on Legal Grounds Only.

Respondents submit that the issue of whether the lower court erred in failing to hold an evidentiary hearing does not merit review under Supreme Court Rule 10. The rule clearly specifies that an evidentiary hearing is only required when facts are in dispute. Townsend v. Sain, 372 U.S. 293 (1963); 28 U.S.C. 2254(d); See Rule 8, Rules Governing Section 2254 Cases. An evidentiary hearing is not necessary when purely legal issues are presented. Barker v. Ohio, 330 F.2d 594 (6th Cir. 1964). The federal district court did not need to hold an evidentiary hearing because it rested its decision on legal grounds only, i.e., that LOZADA failed to satisfy the prejudice requirement of Strickland.

Respondents do not concede that this case is free of factual dispute concerning the trial attorney's alleged failure to assist LOZADA in pursuing an appeal. This factual issue, however, was

irrelevant to the rulings of the lower courts. While it may be necessary in the future via a state habeas corpus proceeding (Appendix C) or a federal court evidentiary hearing to resolve the factual issues of (1) whether LOZADA insisted that counsel appeal for him and (2) what steps counsel took to protect LOZADA's interests, resolution of those issues aren't necessary to the disposition of the case as it stands before the court.

CONCLUSION

The Court should issue a writ of certiorari to resolve a conflict among several federal appellate courts and the Nevada Supreme Court as to whether a state prisoner needs to demonstrate prejudice under Strickland v. Washington, 466 U.S. 688 (1984) when contrary to his client's wishes, counsel does not perfect a direct appeal in the state courts. The Court should deny the application for a writ of certiorari as to any other issues.

DATED: November 13, 1990.

Respectfully Submitted,

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APPENDICES

Jose M. Lozada
Name

N.D.O.P. #23574
Prison Number

Southern Desert Corr. Ctr. (SDCC)
Place of Confinement

RECEIVED
MAR 10 1989
RECEIVED AND FILED
OFFICE OF THE ATTORNEY GENERAL
MAR 8 8 50 AM '89
CLERK
BY VICKI SYZDEK DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOSE M. LOZADA (Full Name), Petitioner

vs.

GEORGE DEEDS, Respondent
(Name of Warden, Superintendent, jailor or authorized person having custody of petitioner.)

and

The Attorney General of the State of Nevada, BRIAN McKAY, Additional Respondent.

(NOTE: If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment of conviction was entered.)

CV-S-89-173 LDG (RLH)
CASE NO. (To be supplied by the Clerk)

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254 BY A PERSON IN STATE CUSTODY

1) Name and location of the court which entered the judgment of conviction under attack: District Court, Clark County, Nevada, 200 South Third Street, Las Vegas, Nevada 89155.

2) Date judgment of conviction was entered: December 16, 1986.

3) Case number: C75275.

4) Length and terms of sentence: Ct. I, 5 yr., Ct. II, 15 yr. cs to Ct. I, Ct. III, 15 yr. and $50,000 cs to Ct. II, Ct. IV, 3 yr. cs to Cts. I & II with credit for time served in the amount of fifty-eight (58) days.

a) In a capital case where death penalty has been imposed, date of scheduled execution N/A

5) Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion?

Yes ☐ No ☒XX

6) Nature of the offense involved: (all counts) **Ct. I - Conspiracy to ~~Sell Controlled Substance~~, Ct. II - Sale of Controlled Substance, Ct. III - Trafficking in Controlled Substance, Ct IV - Possession of Controlled Substances.**

7) What was your plea? (check one)

a) Not Guilty ☒XX b) Guilty ☐ c) Nolo Contendere ☐

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement: **[redacted] ~~There was "no"~~ plea bargain whatsoever in the instan[redacted] case.**

[redacted]

9) If you were found guilty after a plea of not guilty, was the finding made by: (check one)

a) A jury ☒XX b) A judge without a jury ☐

10) Did you testify at trial (if any)? Yes ☐ No ☒XX

11) Did you appeal from the judgment of conviction?

Yes ☐ No ☒XX

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): **N/A**

N/A

N/A

13) If you did not appeal, explain briefly why you did not: I knew nothing about the procedures and this was never explained to me by my retained attoney Mr. James Buchanan,Esq.. He knew before sentencing that I could not afford him for an Appeal and he said nothing to the court. Not even my desire to APPEAL.

a) Did you seek permission to file a late appeal?

Yes [ ] No [XX]

14) State concisely every ground on which you claim that you are being unlawfully held. Summarize briefly the facts supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) Ground One: Petitioner Six Amendment right to "effective assistance of counsel " was violated,when Mr. Buchanan failed to advise Petitioner of his right to appeal, the producedure and time limits involved, and of his ritht to appointed cousel on appeal.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

I was sentenced on December 16, 1986, and was thereafter placed in custody. Mr. Buchana had been my retained attorney since March, 1986 and remained with me until sentencing.

Mr. Buchanan was cognizant that I did not read, write, nor speak the English lanuage and during all of my court proceedings I had a court interpreter.

I had my sister visit Mr. Buchanan to discuss hiring his services again,since the jury had found me guilty. He told my sister that it would be cheaper to let the Clark County Public Defender's Office prosecute an appeal and that he had forward my legal file to their office. Irrespective of that, he did nothing to protect me...filing the notice of appeal, nor inform the court at sentencing of my financial status in order to insure "assistances of counsel" for my first appeal.

(3) Statement of Exhaustion of State Remedies as to Ground One:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes /__/ No /XX/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: **Mr. Buchanan did not advise me of my right to an anpeal in forma pauperis, thus I had no direct appeal.**

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /XX/ No /__/

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: **Petition for Writ of Habeas Corpus, District Court, Clark County, Nevada, which was denied on July 12, 1988.**

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /__/ No /XX/

(f) Did you appeal from the denial of your motion or petition? Yes /XX/ No /__/

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /XX/ No /__/, and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): **Nevada Supreme Court, Carson City, Nevada, No. 19333, October 21, 1988.**

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: In reference to (e), on July 12, 1988, a hearing was held on the WRIT and the DA, myself, and the court interpreter appeared, that was the hearing.

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: N/A

N/A

N/A

B)(1) Ground Two: Petitioner due process and equal protection of the law was violated, when the court did not find Mr. Buchanan's coodnet raised questions of "ineffective assistance of counsel" such that consideration of the first appeal on the jury trial be allowed.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

Petitioner wish to incorporate Ground One supporting facts and all facts mentioned herein.

(3) Statement of Exhaustion of State Remedies as to Ground Two:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes /___/ No /XX/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: I have not had the benefit as an indigent to have a court appointed counsel for the purpose of my first appeal.

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /XX/ No /___/

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: Petition for Writ of Habeas Corpus, District Court, Clark County, Nevada, denied on July 12, 1988.

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /___/ No /XX/

(f) Did you appeal from the denial of your motion or petition? Yes /XX/ No /___/

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /XXX/ No /___/, and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): Nevada Supreme Court, Carson City, Nevada, No. 19333, October 21, 1988.

(h) If your answer t questions (e), (f) or (g) is "No", briefly explain: In reference to (e), on July 12, 1988, a hearing was held on the WRIT and the DA, myself, and the court interpreter appeared, that was the hearing.

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: N/A

N/A

N/A

C)(1) Ground Three: N/A

N/A

N/A

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

N/A

(3) Statement of Exhaustion of State Remedies as to Ground Three:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? ~~Yes~~ ~~No~~ /

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: N/A

N/A

N/A

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? ~~Yes~~ ~~No~~ /

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: N/A

N/A

N/A

(e) Did you receive an evidentiary hearing on your motion or petition? ~~Yes~~ ~~No~~ /

(f) Did you appeal from the denial of your motion or petition? ~~Yes~~ ~~No~~ /

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, ~~Yes~~ ~~No~~ /, and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): N/A

N/A

N/A

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: N/A

N/A

N/A

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: N/A

N/A

N/A

15) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes /XX/ No /__/

16) If you answered "No" to question 15, state which grounds have not been so presented and briefly give your reason(s) for not presenting them: N/A

N/A

N/A

17) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack? Yes /__/ No /XX/. If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed: N/A

N/A

N/A

N/A

18) Do you have any petition, application, motion or appeal now pending in any court regarding the conviction under attack? Yes /___/ No /XX/. If "Yes", state the name of the court and the nature of the proceeding: N/A

N/A

N/A

19) Were you represented by an attorney at any time during the course of your arraignment and plea, trial (if any), sentencing, appeal (if any), or during the preparation, presentation or consideration of any petitions, motions or applications which you filed with respect to this conviction? Yes /XX/ No /___/. If "Yes", state the name(s) and address(es) of any such attorney(s), the proceedings in which you were so represented and whether said attorney(s) was/were of your own choosing or if appointed by the court: Mr. James Buchanan, Esq., 300 South Maryland Parkway, Las Vegas, Nevada 89101, was my retained attorney of record and I have not had another attorney for any reason.

Mr. Buchanan was my trial attorney!

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

N/A
Signature of Attorney (if any)

N/A

N/A

N/A
(Attorney's full address and telephone number.)

Jose M. Lozada
Signature of Petitioner

Jose M. Lozada In Proper Person

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. §1746. 18 U.S.C. §1621.

Executed at S.D.C.C., PoO. Box 208 (Location) Indian Springs, NV 89707 on January 19, 1989 (Date)

Jose M. Lozada
(Signature)

Jose M. Lozada #23574

CERTIFICATE OF SERVICE

The, Petitioner, Joseph M. Lozada, unde. the penalty of perjury, avows and swears that he has read the foregoing WRIT OF HABEAS CORPUS, and knows the contents to be true and correct except as to those matters stated on information and belief and as to those matters he believes them to be true; that he caused a copy of the above-mentioned motion to be mailed to the following address, by placing said motion in the U.S. Mail at S.D.C.C., directed and address to:

Bryan McKAY
Attorney General of Nevada
300 S. 3rd Street
Las Vegas, NV. 89101

DATED: this 19 day of January, 1989.

S/ Joe M. Lozada

Joseph M. Lozada #23574
Petitioner In Pro-Per
P.O. Box 208 - S.D.C.C.
Indian Springs, NV 89070

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Nevada Revised Statutes, sec. 177.315. Remedy: To whom available; conditions.

1. Any person convicted of a crime and under sentence of death or imprisonment in the state prison who claims that the conviction was obtained, or that the sentence was imposed in violation of the Constitution of the United States or the constitution of this state may, without paying a filing fee, apply for post-conviction relief from the conviction or sentence.

2. The remedy provided in this section is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, the remedy of direct review of the sentence or conviction or the writ of habeas corpus. It comprehends and takes the place of all other common law, statutory or other remedies which have heretofore been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them.

3. Unless there is good cause shown for delay, a proceeding under NRS 177.315 to 177.385, inclusive, must be filed within 1 year after entry of judgment of conviction or, if an appeal has been taken from such judgment, within 1 year after the final decision upon or pursuant to the appeal.

4. The execution of a sentence shall not be stayed for the period provided in subsection 3 simply because a petition for post-conviction relief may be filed within that period. A petition for post-conviction relief must actually be filed or the petitioner must show other reasons why a stay should be granted.

Nevada Revised Statutes, secs. 34.360,-.725, and -.730.

34.360 **Persons who may prosecute writ.** Every person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint.

34.725 **Petitioner required to file for post-conviction relief.** A petitioner may not file a petition for a writ of habeas corpus unless he previously filed a petition for post-conviction relief pursuant to NRS 177.315 to 177.385, inclusive, or demonstrates good cause for the failure to file a petition for post-conviction relief or meet the time requirements for filing a petition for post-conviction relief and actual prejudice to the petitioner.

34.730 **Petition: Verification; filing; title; service.**

1. A petition for a writ of habeas corpus requesting relief from a judgment of conviction or sentence in a criminal case must be verified by the petitioner or his counsel and filed with the clerk of the district court for the county in which the petitioner is in actual custody or with the clerk of the supreme court. If the petition is verified by counsel, the counsel shall also verify that the petitioner personally authorized him to commence the action. Before filing the petition, the clerk of a district court shall determine by the contents of the petition whether the petitioner is in actual custody in that judicial district.

2. The petition must be titled "Petition for Writ of Habeas Corpus (Post-Conviction)" and be in substantially the form set forth in NRS 34.735. The petition must name as respondent and be served by mail upon the officer or other person by whom the petitioner is confined or restrained. A copy of the petition must be served by mail upon the attorney general and the district attorney in the county in which the petitioner was convicted.

3. The clerk of the district court shall file a petition for a writ of habeas corpus as a new action separate and distinct from any original proceeding in which a conviction may have been had.

Rule 4(b) of the Nevada Rules of Appellate Procedure.

> Appeals in criminal cases. In a criminal case, the notice of appeal by a defendant shall be filed in the district court within thirty (30) days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty (30) days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within thirty (30) days after the entry of the judgment. When an appeal by the state is authorized by statute, the notice of appeal shall be filed in the district court within thirty (30) days after the entry of the judgment or order appealed from. A judgment or other is entered within the meaning of this subdivision when it is signed by the judge and filed with the clerk.

APPENDIX

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PROVISION INVOKED

CONSTITUTION OF THE UNITED STATES:

AMENDMENT VI - **Rights of accused in criminal prosecutions.** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT V - **Prosecution by presentment, indictment; double jeopardy; self-incrimination; due process; property taken for public use.** No person shall be held to answer for a capital, or a otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV - Section 1. **Citizenship; privileges and immunities; due process; equal protection.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein the reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF NEVADA:

Aritcle 1, Section 8. **Rights of accused in criminal prosecutions; jeopardy; due process of law; eminent domain.** No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cased of the militia when in actual service and impeachment, and in cased of the militia when in actual service and the land naval forces in time of war, or which this state may keep, with the consent of congress, in time of peace, and in cases of petit larceny, under the regulation of the legislature) except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or attorney-general of the state, and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in persona, and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any

. . .

criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without just compensation having been first made, or secured, except in cases or war, riot, fire, or great public peril, in which case compensation shall be afterward made.

NEVADA RULES OF APPELLATE PROCEDURE:

Rule 4(b) - **Appeals in Criminal Cases.** In a criminal case, the notice of appeal by a defendant shall be filed in the district court within thirty (30) days after the entry of the judgment of order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other then newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty (30) days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extent the time for appeal from a judgment of conviction if the motion is made before or within thirty (30) days statute, the notice of appeal shall be filed in the district court within thirty (30) days after the entry of the judgment of order appealed from. A judgment or order is entered within the meaning of this subdivision when it is signed by the judge and filed with the clerk.

NEVADA REVISED STATUTE (NRS):

NRS 171.188 - **Procedcure for appointment of attorney for indigent defendant.**

1. Any defendant charged with a public offense who is an indigent may, by oral statement to the district judge, justice of the peace, municipal judge or master, request the appointment of an attorney to represent him.

2. The request must be accompanied by the defendant's affidavit, which must state:

(a) That he is without means of employing an attorney; and

(b) Facts with some particularity, definiteness and certainty concerning his financial disability.

3. The district judge, justice of the peace, municipal judge or master shall forthwith consider the application and shall make such further inquiry as he considers necessary, If the district judge, justice of the peace, municipal judge or master:

(a) Finds that the defendant is without means of employing an attorney; and

(b) Otherwise determines that representation is required, the judge, justice or master shall designate the public defender of the county or the state public defender, as appropriate, to represent him. If the appropriate public defender is unable to represent him, or other good cause appears, another attorney must be appointed.

. . .

4. The county or state public defender must be reimbursed by the city for costs incurred in appearing in municipal court. The county shall reimburse the state public defender for costs incurred in appearing in justice's court. If a private attorney is appointed as provided in this section, he must be reimbursed by the county for appearance in justice's court or the city for appearance in municipal court in amount not to exceed $75 per case.

NRS 178.397 - **Assignment of counsel.** Every defendant accused of a gross misdemeanor or felony who is financially unable to obtain counsel is entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before a magistrate of the court through appeal, unless he waives such appointment.

NRS 260.060 - Magistrate or district court may, on its own motion or upon motion of the public defender or the indigent person, appoint and compensate out of county funds an attorney other than, or in addition to, the public defender to represent such indigent person at any stage of the proceedings or an appeal in accordance with the laws of this state pertaining to the appointment of counsel to represent indigent criminal defendants.

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